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No. 99-579

IN THE
SUPREME COURT OF THE UNITED STATES

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,
Petitioners,

v.

SALOMON BROTHERS INC. and SALOMON BROTHERS REALTY CORP.,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For the Seventh Circuit

BRIEF *AMICUS CURIAE* OF AARP AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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No. 99-579

In The Supreme Court of the United States

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,
Petitioners,

v.

SALOMON BROTHERS INC. and SALOMON BROTHERS REALTY CORP.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AARP AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE* [1]

AARP is a nonprofit membership organization of more than 33 million Americans age 50 or older, dedicated to addressing the needs and interests of older people. Approximately one-third of AARP's members are working, and receive employer-funded health, pension, disability, and other employee benefits.

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[1] No counsel for any party authored any portion of this brief. No persons other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all citizens. In its efforts to promote independence, AARP works to foster the economic security of individuals as they age by attempting to ensure the availability, security, equity and adequacy of private pension, health, disability, and other employee benefits.

It is vitally important to AARP members to ensure that statutorily prohibited transactions may be remedied through lawsuits against all parties to the transactions. AARP members and other older Americans have a significant interest in ensuring that plan assets will be available to pay the benefits to which they are entitled and are used exclusively for the benefit of participants and beneficiaries. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A); *cf. Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 140-43 & n.8 (1985) (ERISA was passed to prevent the misuse and mismanagement of plan assets). As of the second quarter of 1999, employer-sponsored private pension plans alone had over $4.6 trillion in assets, the single largest pool of capital in the United States. U.S. FEDERAL RESERVE BOARD, FLOW OF FUNDS ACCOUNTS OF THE UNITED STATES, SECOND QUARTER 1999 (Washington, DC: Board of Governors of the Federal Reserve System, 1999), Table L119. Such substantial assets lend themselves to potential misuse and mismanagement.

The National Employment Lawyers Association (NELA) is a voluntary organization, founded in 1985, of over 3,000 attorneys who specialize in representing individuals in controversies arising out of the workplace. It is the country's only professional membership organization comprised of lawyers who primarily represent employees in cases involving employment discrimination, employee benefits, wrongful discharge, and other employment-related matters. NELA has devoted itself to supporting precedent-setting litigation affecting the rights of individuals in the workplace. It is of crucial importance to those individuals that all assets of the employee benefit plans in which they participate be available to pay benefits.

AARP and NELA thus advocate on behalf of individuals throughout the country to protect the rights of participants in private, employer-sponsored employee benefit plans covered by ERISA, 29 U.S.C. § 1001 *et seq.* For instance, AARP and NELA have filed numerous briefs *amicus curiae*, both jointly and singly, on various types of ERISA cases. *See, e.g., UNUM v. Ward*, 526 U.S. 358 (1999) (preemption); *Geissal v. Moore Medical Corp.*, 524 U.S. 74 (1998) (COBRA rights); *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510 (1997) (application of ERISA § 510 to welfare plans); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996) (definition of fiduciary); *Varity Corp. v. Howe*, 516 U.S. 489 (1996) (participant rights under ERISA § 502(a)(3)); *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) (ERISA remedies).

The decision in this case will have a direct and vital bearing on the economic security of older working Americans. In light of the significance of the issues presented by this case, *amici curiae* respectfully submit this brief.[2/]

SUMMARY OF ARGUMENT

AARP and NELA address the only issue before the Court–whether there is a cause of action under § 502(a)(3) for equitable relief against a nonfiduciary party in interest which engages in a prohibited transaction.[3/] *Amici* believe that the Court should answer this question in the affirmative.

[2/] The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

[3/] The Seventh Circuit only decided one issue – whether § 502(a)(3) permits a cause of action against a nonfiduciary party in interest. The Seventh Circuit did not address the issue of whether the relief sought by Petitioners was "appropriate equitable relief." Consequently, the Court should not review this issue. *See United States v. Williams*, 504 U.S. 36, 42 (1992) (the Court "will not review a question not pressed or passed upon by the courts below").

When interpreting ERISA's civil enforcement provisions under § 502(a), the Court repeatedly has looked at the plain language of ERISA, the "evident care" with which the civil enforcement provisions were crafted, the structure of the statute, and the policies underlying ERISA. The Court has previously concluded that the precise language of the statute must be followed. *See Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993); *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). The Court has been unwilling to read into ERISA implied claims or remedies, and it has been similarly unwilling to read limiting language into the statute. *Id.* This case should be treated no differently. Accordingly, the Court should hold that § 502(a)(3) authorizes a cause of action for equitable relief against a nonfiduciary party in interest with which a plan has engaged in a prohibited transaction.

ARGUMENT

I. PRIOR SUPREME COURT PRECEDENT, THE RELEVANT TEXT OF ERISA § 502(a)(3), THE STRUCTURE OF ERISA'S ENTIRE ENFORCEMENT SCHEME, AND THE PURPOSES OF THE ACT ALL SUPPORT THE CONCLUSION THAT ERISA § 502(a)(3) AUTHORIZES A CAUSE OF ACTION FOR EQUITABLE RELIEF AGAINST A NONFIDUCIARY PARTY IN INTEREST WHICH ENGAGES IN A PROHIBITED TRANSACTION.

The issue before the Court is whether ERISA § 502(a)(3) permits a cause of action for equitable relief against a nonfiduciary party in interest which engages in a prohibited transaction.

A. The Court Has Strictly Interpreted ERISA's Civil Enforcement Provisions, Refusing to Infer Remedies and Causes of Action or to Read in Limitations Not Contained in the Wording of ERISA § 502(a).

This is not the first time that the Court will determine the scope of ERISA's civil enforcement provisions under § 502(a),

29 U.S.C. § 1132(a). *See Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993); *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). In interpreting those provisions, the Court has proceeded from the premise that § 502 is a "carefully integrated civil enforcement scheme," which, in turn, is part of a "comprehensive and reticulated" statute. *Mertens*, 508 U.S. at 251; *Russell*, 473 U.S. at 146. As a result, the Court has refused to infer claims for relief and remedies which are not specifically enumerated in these civil enforcement provisions. Conversely, the Court has refused to read in limitations to these civil enforcement provisions where there are none stated in § 502(a).

In *Russell*, the Court held that a fiduciary could not be liable under § 409(a)[4/] to a participant or beneficiary for compensatory or punitive damages for a fiduciary breach. *Russell*, 473 U.S. at 148. *Russell* acknowledged that § 409 is specifically enforceable under, as well as expressly incorporated by reference into, § 502(a)(2). *Id.* at 140. The Court reasoned that, because the language of § 409 expressly authorizes only plan-based relief, the remedy for an action that is brought under § 502(a)(2) to enforce a violation of § 409(a) runs only to the

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[4/] ERISA § 409(a) states -

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

29 U.S.C. § 1109(a).

plan. Thus, it does not inure to the benefit of the individual participants or beneficiaries. *Id.* at 140, 144.

The Court next interpreted § 502(a) in *Mertens*. The issue in *Mertens* was whether a nonfiduciary who knowingly participated in a fiduciary breach was liable to the plan under § 502(a)(3) for losses resulting from such breach. *Mertens*, 508 U.S. at 251. The Court's analysis of that question focused on whether the phrase "appropriate equitable relief" in § 502(a)(3) encompassed compensatory or money damages. *Id.* at 255. In construing that phrase, the Court applied the established rule that a statute, if possible, be construed in such a fashion that every word has some operative effect so that no part will be rendered superfluous. *Id.* at 258 ("We will not read the statute to render the modifier superfluous.") (*citing United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *Moskal v. United States*, 498 U.S. 103, 109-10 (1990)). Under that rule, the Court concluded that "appropriate equitable relief" under § 502(a)(3) does not include compensatory or money damages because that interpretation would render the term "equitable" superfluous. *Id.* The Court reiterated the view that ERISA's "carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Id.* at 254 (*citing Russell*, 473 U.S. at 146-47; emphasis in original).

In *Varity*, the issue was whether § 502(a)(3) authorizes participants and beneficiaries to bring an action for individual relief based on a breach of fiduciary duty. 516 U.S. at 507. The Court stated that the words of § 502(a)(3) are extremely broad and would encompass such an action. *Id.* at 510. The Court rejected the argument that only § 409 covers liability for breaches of fiduciary duty. Indeed, the Court pointedly stated "that is not what the title or the provision says." *Id.* The Court again relied on the structure of ERISA's civil enforcement provisions. It contrasted the focus on a specific area in § 502(a)(2) with the absence of such a limitation in § 502(a)(3). *Id.* at 510-512. The Court refused to read such a limitation into § 502(a)(3).

Thus, when interpreting § 502(a), the Court repeatedly has looked at the plain language of ERISA, the "evident care" with which the civil enforcement provisions were crafted, and the structure of the statute, and concluded that the precise language of the statute must be followed. The Court has been unwilling to read into ERISA implied claims or remedies, and it has been similarly unwilling to read limiting language into the statute.

B. The Plain Language of ERISA § 502(a)(3) Authorizes a Lawsuit for Equitable Relief Against a Nonfiduciary Party in Interest Which Has Engaged in a Prohibited Transaction.

Analysis of the plain language of ERISA's civil enforcement provisions inexorably leads to the conclusion that § 502(a)(3) authorizes an action to obtain relief from a nonfiduciary party in interest for a prohibited transaction.

Section 502(a)(3) authorizes a civil action -

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

29 U.S.C § 1132(a)(3).

Thus, § 502(a)(3) allows a participant, beneficiary, or fiduciary (as in this case) to bring a civil action for injunctive relief for a violation of "any provision" of Title I, and to obtain "appropriate equitable relief" to redress such a violation or to enforce "any provisions" of that Title. *Id.* Title I includes § 406, which sets out specific transactions between a fiduciary and a party in interest that Congress believed should always be prohibited because of the high incidence of misuse and

mismanagement of plan assets.[5] *See Commissioner of Internal Revenue v. Keystone Consolidated Industries*, 508 U.S. 152, 160 (1993) ("Congress' goal was to bar categorically a transaction that was likely to injure the pension plan."). The only limit imposed on the relief authorized by § 502(a)(3) is that it be in the form of injunctive or "other appropriate equitable relief." *Id.* In *Varity*, the Court stated that "[t]he words of subsection (3) – 'appropriate equitable relief' to 'redress' any 'act or practice which violates any provision of this title' – are broad enough to cover individual relief for breach of a fiduciary obligation." 516 U.S. at 510. Similarly, those same words and/or the words "appropriate equitable relief" to "enforce any provisions of this title" are "broad enough to cover" equitable relief against a nonfiduciary party in interest.

Moreover, if Congress had intended to limit § 502(a)(3)'s enforcement authority, it would not have used the phrase "any" to describe the type of Title I "violations" that are remediable under that section, or to describe the Title I violations that the courts may "enforce" under that section. *See Inter-Modal Rail Employees Association v. Atchison, Topeka and Santa Fe Railway Co.*, 520 U.S. at 515. ("Had Congress intended . . . , it could have easily" done so.). In other words, the use of the term "any" indicates Congress' intent to make claims against

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[5] The party in interest rules at issue in this case state in relevant part -

> (a)(1) A fiduciary with respect to the plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect–
>
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan[.]

Sections 406(a)(1)(A) &(D), 29 U.S.C. §§ 1106(a)(1)(A) &(D).

nonfiduciary parties in interest seeking to remedy prohibited transactions enforceable under § 502(a)(3). *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 739 n.1 (1995) ("A broad construction of the word 'any' is hardly novel.") (*citing John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank*, 510 U.S. 86, 96 (1993)); *Citizens' Bank v. Parker*, 192 U.S. 73, 81 (1904) ("The word any excludes selection or distinction.").

C. ERISA's Civil Enforcement Scheme Confirms That ERISA § 502(a)(3) Should Be Read to Authorize Equitable Relief Against a Nonfiduciary Party in Interest Which Has Engaged in a Prohibited Transaction.

The language of § 502(a)(3) authorizing an action against a nonfiduciary party in interest for violation of the prohibited transaction rules or to enforce those rules is consistent with ERISA's "carefully integrated civil enforcement" scheme under § 502(a). *Mertens*, 508 U.S. at 252 (*citing Russell*, 473 U.S. at 146). Sections 502(a)(2)[6] and 502(a)(3) provide independent methods for remedying a prohibited transaction. Whereas § 502(a)(2) authorizes broad recovery for a plan by providing both legal and equitable relief against fiduciaries to remedy a prohibited transaction, § 502(a)(3) authorizes more limited relief against nonfiduciary parties in interest by providing only for equitable relief to "redress" a prohibited transaction or to "enforce" ERISA's prohibited transaction provisions. Thus, § 502(a)(3) fits into ERISA's "integrated" enforcement scheme by, *inter alia*, authorizing actions for different relief against nonfiduciary parties in interest where there have been violations

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[6] Section 502(a)(2) states -

> A civil action may be brought . . .
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409.

29 U.S.C. § 1132(a)(2).

of the prohibited transaction rules in situations when plan-based relief against a fiduciary is not available, not adequate, or not appropriate. Indeed, any other construction would render § 502(a)(3) superfluous to § 502(a)(2) in remedying a prohibited transaction. *Russell*, 473 U.S. at 144. Looked at another way, any other construction would read § 502(a) as limiting prohibited transaction remedies to those set forth in § 409. However, as the Court rhetorically asked in *Varity*: "why should one believe that Congress intended the specific remedies in § 409 as a limitation?" 516 U.S. at 511.

In *Russell*, the Court succinctly stated:

> The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statute." [Citation omitted].

Just as that scheme provides "strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly," *Mertens*, 508 U.S. at 254 (1993) (*citing Russell*, 473 U.S. at 146-47), it also provides strong evidence that Congress did not forget to incorporate limitations, such as that articulated by the Seventh Circuit and urged by Respondent here.[7]

To the contrary, in *Varity Corp. v. Howe*, the Court read § 502(a)(3), which is at issue here, as a "catch-all" provision authorizing equitable relief for all violations of ERISA not otherwise remediable under § 502. Thus, in upholding a

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[7] In contrast, Congress was extremely specific about who could assert what causes of actions under each specific subsection of § 502(a). *Compare* § 502(a)(1) (only participants or beneficiaries) *with* § 502(a)(2) (participants, beneficiaries, fiduciaries and the Secretary of Labor) *with* §§ 502(a)(5) & (6) (only the Secretary). However, nowhere in ERISA's civil enforcement scheme does it limit <u>who</u> may be sued.

reading of § 502(a)(3) allowing individual relief for breaches of fiduciary duty, the Court reasoned as follows:

> Such a reading is consistent with § 502's overall structure. Four of that section's six subsections focus upon specific areas, *i.e.*, the first (wrongful denial of benefits and information), the second (fiduciary obligations related to the plan's financial integrity), the fourth (tax registration), and the sixth (civil penalties). The language of the other two subsections, the third and the fifth, creates two "catchalls," providing "appropriate equitable relief" for "any" statutory violation. This structure suggests that these "catchall" provisions act as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy. And, contrary to *Varity*'s argument, there is nothing in the legislative history that conflicts with this interpretation. See S. Rep. No. 93-127, p. 35 (1973), 1 Leg. Hist. 621 (describing Senate version of enforcement provisions as intended to "provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]"); H.R. Rep. No. 93-533, at 17, 2 Leg. Hist. 2364 (describing House version in identical terms).

Varity, 516 U.S. at 512.

As explained above, nothing in the wording of § 502(a)(3) would foreclose application of that same "safety net" to the prohibited transaction claim at issue here. Application of that "safety net" will allow the imposition of "appropriate equitable relief . . . to redress . . . violations" of Section 406, which is one of the "provisions of" Title I, *see* § 502(a)(3)(B), where § 502 does not elsewhere adequately remedy" the injury, *Varity*, 516 U.S. at 512, or enforce the statute.

Varity also compels the rejection of an argument advanced by the Seventh Circuit; to wit, that because § 502(a)(6) provides

a specific cause of action by the Secretary of Labor to sue a nonfiduciary party in interest for a civil penalty, there can be no cause of action under the "catchall" provision of § 502(a)(3). In *Varity*, the defendant employer contended that, under the canon that "the specific governs the general,"the articulation of a specific remedy in § 409, enforceable through § 502(a)(2), foreclosed any remedy under the general wording of § 502(a)(3). The Court rejected this contention. *Varity*, 516 U.S. at 512. Similarly, the existence in § 502(a)(6) of a specific penalty remedy for a prohibited transaction does not foreclose imposition of other remedies under the more general wording of § 502(a)(3).

Moreover, contrary to the Seventh Circuit's conclusion, nothing in § 406(a), 29 U.S.C. § 1106(a), mandates any contrary conclusion. Reduced to its essence, that court's opinion rested on the proposition that because § 406(a) limits prohibited transactions to those which are caused by fiduciaries and says nothing about liability of nonfiduciaries, nonfiduciaries may not be sued under ERISA. However, this reasoning confuses ERISA's substantive provisions with its civil enforcement provisions. If anything is clear from this Court's analysis of ERISA, it is the fact that § 502, and only § 502, governs the issue of who may sue for what relief under ERISA. See discussion in Section A, above, regarding ERISA's "carefully integrated enforcement scheme" and its place in the "comprehensive and reticulated statute."

Consequently, the mere fact that § 406(a) defines a party in interest transaction as one caused by a fiduciary is simply irrelevant to the interpretation of § 502(a)(3). Once a transaction described in § 406(a) is shown to have been caused by a fiduciary, then the courts are specifically permitted to grant "any" equitable relief to redress such violations or to otherwise enforce § 406. *Cf. Mertens* (sought-after relief against nonfiduciary party in interest not available because it was legal, not equitable).

Accordingly, ERISA's enforcement scheme supports *amici*'s interpretation of § 502(a)(3).

D. ERISA's Basic Purpose Corroborates the Plain Meaning of ERISA § 502(a)(3) Authorizing Equitable Relief Against a Nonfiduciary Party in Interest Which Engages in a Prohibited Transaction.

Given the language of § 502(a)(3) and the structure of ERISA, the Court need not look behind the statute in order to decide the question before it. However, in *Varity*, the Court supplemented its analysis of the language and structure of § 502 by discussing the policies underlying ERISA. It concluded that "ERISA's basic purposes favor a reading of the third subsection [§ 502(a)(3)] that provides the plaintiffs with a remedy." 516 U.S. at 513. The Court has consistently recognized that "ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) *(citing Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989). ERISA's underlying policy is to protect the interests of participants and beneficiaries in employee benefit plans by "establishing standards of conduct, responsibility, and obligation for fiduciaries" and "by providing for appropriate remedies and sanctions" for violations of these fiduciary standards. ERISA § 2(b), 29 U.S.C. § 1001(b). *See Varity*, 516 U.S. at 513.

Construing § 502(a)(3) as authorizing relief against nonfiduciary parties in interest is clearly within the scope of ERISA's remedial purposes of protecting the interests of participants and beneficiaries in employee benefit plans. Providing this avenue of relief is consistent with ERISA's structure – ERISA requires bonding solely to cover losses caused by fraud and dishonesty.[9] And, ERISA has no

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[9] ERISA requires every fiduciary of an employee benefit plan and every person who handles funds or other property of the plan to be bonded. However, the bond's coverage is limited to acts of fraud or dishonesty against the plan. Section 412, 29 U.S.C. § 1112. The amount of the bond need only be 10 per cent of the plan's assets, and the maximum amount of

(continued...)

requirement that plans and/or fiduciaries maintain fiduciary liability insurance to cover any liability or losses from their imprudent behavior. Dan M. McGill, *et al.*, FUNDAMENTALS OF PRIVATE PENSIONS at 59 (7th ed. 1996). It is solely within the discretion of a plan and its fiduciaries to purchase such insurance and to determine the liability limits. Moreover, these policies often deduct defense costs from the liability limits. Finally, these policies infrequently pay damage awards because of numerous exclusions and limitations and the equitable nature of most claims. Joan M. Dolinsky, *Fiduciary Liability Coverage -- An Overview*, American Bar Association, SECTION OF LABOR AND EMPLOYMENT LAW PROGRAM MATERIALS, ANNUAL MEETING, Atlanta, GA 1999, at 767. *See also*, Arthur J. Dreschler & Jennifer Oliver, *Rules to Follow to Protect Yourself from Fiduciary Liability Claims*, PROFIT SHARING, May 1995, at 14 (listing various types of exclusions); Richard G. Ritchie, *Fiduciary Insurance Coverage*, EMPLOYEE BENEFIT ISSUES -- THE MULTIEMPLOYER PERSPECTIVE 1998, at 386 (International Foundation of Employee Benefit Plans) ("policies are 'self-exhausting' or 'wasting limits' policies in that they provide that defense costs and expenses . . . are part of the limits and not in addition to them"); Robert G. Gallagher & Angela C. Montez, *Fiduciary Liability Insurance – You Paid The Premium, Now Why Won't They Pay the Claim?* EMPLOYEE BENEFIT ISSUES – THE MULTIEMPLOYER PERSPECTIVE 1995, at 445 (International Foundation of Employee Benefit Plans) (policies paying defense costs in addition to limits "have been unavailable in recent years"; "policy limits could be exhausted on defense costs with the result that no funds would be available to satisfy any judgment").

Moreover, as one commentator has noted:

> Unfortunately, there is often confusion and misunderstanding as to the insurance necessary to cover these four areas of liability. For example, it

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[9](...continued)
the bond is only $500,000. Section 412(a), 29 U.S.C. § 1112(a).

> is not uncommon for trustees to believe [incorrectly] that their bonding insurance covers fiduciary liability, that professional liability insurance covers ERISA fiduciary liability. . . .

Jeffrey D. Mamorsky, *Fiduciary Liability Insurance: Are You Really Protected?* EMPLOYEE BENEFIT ISSUES -- THE MULTIEMPLOYER PERSPECTIVE 1996, at 459-460 (International Foundation of Employee Benefit Plans).

Consequently, it is unrealistic to expect that plans and participants will be made whole in all cases for violations of ERISA's party-in-interest rules through insurance. Indeed, in many cases, the only viable method for making plans and participants whole is to be able to sue nonfiduciary parties in interest for equitable relief.

Any construction of § 502(a)(3) other than according to its plain language, which does not limit who may be sued, would result in the permanent loss of plan assets wrongly transferred to parties in interest. Such a result clearly is contrary to ERISA's stated policy, recognized by this Court, *Shaw v. Delta Air Lines Inc.*, 463 U.S. at 90, of protecting the interests of participants and beneficiaries in employee benefit plans.

CONCLUSION

The Court's three previous interpretations of ERISA's civil enforcement provisions, the relevant text of § 502(a)(3), the structure of the statute's entire enforcement scheme, and the purposes of the Act all support the conclusion that ERISA § 502(a)(3) authorizes equitable relief against a nonfiduciary party in interest which engages in a prohibited transaction. For the foregoing reasons, AARP and the National Employment Lawyers Association urge the Court to reverse the decision of the Seventh Circuit Court of Appeals.

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